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BEFORE THE ARIZONA CORPORATION COMMISSION

2004 APR -5 A 10: 56

COMMISSIONERS

MARC SPITZER, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES

AZ CORP COMMISSION
DOCUMENT CONTROL

In the matter of:

YUCATAN RESORTS, INC.,

3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

YUCATAN RESORTS, S.A.,

3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
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**RESORT HOLDINGS INTERNATIONAL,
INC.,**

3222 Mishawaka Avenue
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
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DOCKET NO. S-03539A-03-0000

**SECURITIES DIVISION'S RESPONSE
[EFFECTIVELY REPLY] TO
RESPONDENTS' JOINT MOTION TO
COMPEL OR, ALTERNATIVELY, TO
VACATE THE TEMPORARY ORDER
TO CEASE AND DESIST**

Arizona Corporation Commission

DOCKETED

APR - 5 2004

DOCKETED BY	
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1 **WORLD PHANTASY TOURS, INC.,**)
 a/k/a MAJESTY TRAVEL)
 2 a/k/a VIAJES MAJESTY)
 Calle Eusebio A. Morales)
 3 Edificio Atlantida, P Baja)
 APDO, 8301 Zona 7 Panama,)
 4)
AVALON RESORTS, S.A.)
 5 Av. Coba #82 Lote 10, 3er. Piso)
 Cancun, Q. Roo)
 6 Mexico C.P. 77500)
)
 7 **MICHAEL E. KELLY and LORY KELLY,**)
 husband and wife,)
 8 29294 Quinn Road)
 North Liberty, IN 46554;)
 9 3222 Mishawaka Avenue)
 South Bend, IN 46615;)
 10 P.O. Box 2661)
 South Bend, IN 46680,)
 11)
 Respondents.)
 12)

13
 14 The Securities Division of the Arizona Corporation Commission ("Division") hereby
 15 responds (in effect, replies) to Respondents' Joint Motion to Compel or, Alternatively, To Vacate
 16 The Temporary Order to Cease and Desist ("Joint Motion") filed by respondents Yucatan Resorts,
 17 Inc., Yucatan Resorts, S.A., Resort Holdings International, Inc., Resort Holdings S.A., World
 18 Phantasy Tours, Inc., and Michael Kelly (collectively "Respondents"). This Joint Motion apparently
 19 constitutes the response to the Division's challenge to Respondents' repeated use of unauthorized
 20 civil discovery rules during the course of these administrative proceedings.¹

21 ...

22
 23 ¹ The Division challenged Respondents' multiple attempts to invoke the Rules of Civil Procedure as a
 24 means of pursuing discovery by submitting four separate (but similar) responses, including, e.g., *Securities*
 25 *Division's Response to Yucatan Resorts, Inc., Yucatan Resorts, S.A., Resort Holdings, Inc., and Resort*
 26 *Holdings, S.A.'s First Set of Non-Uniform Interrogatories*. During the March 4, 2004, pre-hearing
 conference in this matter, the ALJ indicated that the Division was to file the above discovery challenges by
 March 5, that the Respondents would be afforded a chance to respond and, if it so chose, the Division could
 subsequently file a Reply. This, in effect, constitutes that Reply.

1 As evidenced by their Joint Motion, Respondents are pressed to offer even marginal support
2 for their contention that civil discovery rules are applicable to administrative proceedings. Instead,
3 Respondents are left to rely on a patchwork of untenable interpretations and illogical extrapolations.
4 The notable absence of any persuasive authority in support of Respondents' position is in stark
5 contrast to the Division's prior challenge to Respondents' civil discovery attempts, wherein the
6 Division was able to cite treatises, state and federal case law, administrative rules and administrative
7 procedures acts in support of its position.

8 ***Misconstruing the "Default Provision"***

9 Respondents initially seek to argue that R14-3-101(A), a default provision contained in the
10 Arizona Rules of Practice and Procedure Before the Corporation Commission, actually allows a
11 respondent to an administrative proceeding to chose and apply any civil discovery rule it wishes
12 whenever the "administrative rules do not explicitly regulate and/or provide procedure for how to
13 operate." This strained interpretation, together with the adoption of non-existent terms (see, e.g.
14 "explicit"), exposes the spurious nature of this claim.

15 Commission Rule R14-3-101(A) states, in pertinent part: "In all cases in which procedure is
16 set forth *neither by law, nor by these rules, nor by regulations or order of the Commission*, the
17 Rules of Civil Procedure for the Superior Court of Arizona as established by the Supreme Court of
18 Arizona shall govern" (emphasis added). The obvious intent of this provision is to provide a
19 secondary procedural resource only *where there is nothing in the law or rules governing a*
20 *particular procedure*. Of course, and as discussed at length in the Division's initial challenges,
21 there already are layers of governing authority with respect to the discovery procedures for
22 administrative proceedings within Arizona. Indeed, both laws **and** rules explicitly outline the
23 proper discovery procedures for administrative proceedings in this state. It follows that there is
24 neither need nor justification to charge into the civil rules of procedure for guidance on discovery.

25 ...

26 ...

Unwarranted Extrapolations

As additional support for Respondents' contention that civil discovery rules are applicable, Respondents cite to Commission Rule R14-3-106(K), which provides in part: "Motions shall conform insofar as practicable with the Rules of Civil Procedure." In a remarkable leap, Respondents then argue that since motion practice impacts the discovery practice between parties, this concept of conforming should be imputed over to discovery procedures as well. At best, this extrapolation is not compelling.

Initially, this argument assumes that conforming to a particular civil format (e.g., "all motions shall be accompanied by a memorandum," *Ariz.R.Civ.P., Rule 7.1*) can be equated with adopting specific civil procedures (e.g., initial disclosure statements are required within 40 days after the filing of a responsive pleading, *Ariz.R.Civ.P., Rule 26.1*); this is a dubious claim in its own right. Moreover, Respondents' assertion hardly explains how motions and discovery procedure are necessarily linked. Still further, if the legislature and Arizona Corporation Commission ("ACC") did indeed intend for parties in administrative forum to conform to the civil discovery rules, why would the legislature and ACC bother to enact specific administrative discovery provisions?

The simple answer is that Commission Rule R14-3-106(K) has nothing to do with discovery or discovery procedure, and in fact only serves to highlight the fact that *when the ACC wants to adopt characteristics of a particular section of Arizona Rules of Civil Procedure, it explicitly adopts a rule to say so*. The use of this unwarranted extrapolation as added support for the use of civil discovery in administrative proceedings is again hardly convincing.

The Rules of Civil Procedure Do Not Provide a "Format" For Administrative Discovery

Respondents have further sought to justify their civil discovery attempts by citing to A.R.S. § 41-1062(A). Specifically, Respondents argue that this statute "proves, not refutes" that discovery is permitted and that the Rules of Civil Procedure provide the guiding format on discovery. Although the Division agrees that certain prescribed forms of discovery are indeed permitted in

1 administrative proceedings, the Division utterly denies the proposition that rules of civil procedure
2 “provide the guiding format on discovery.”

3 With respect to this latter assertion, Respondents argue that because A.R.S. § 41-1062
4 instructs that subpoenas issued as part of administrative discovery should be served and enforced in
5 a manner like that of a civil action, this particular statute is in fact suggesting that all administrative
6 procedures be conducted in a civil format manner. This argument is again clearly untenable;
7 indeed, the fact that A.R.S. § 41-1062 explicitly recognizes the civil rules as a procedural model for
8 subpoena service and enforcement indicates that where no such directives are included, this
9 procedural cross-over is not warranted. Quite simply, this is a precise instance of *expressio unius*
10 *est exclusio alterius*.

11 In fact, this particular statute provides absolutely no suggestion that the civil rules of
12 procedure are to used as a procedural model for discovery; much to the contrary, the statute actually
13 includes the specific administrative discovery rules available to parties to an administrative
14 proceeding. It is certainly problematic for Respondents to reconcile an argument that a particular
15 statute suggests that the format of the civil rules of discovery applies to administrative proceedings
16 when in fact this same statute explicitly outlines the actual methods of discovery acceptable in
17 administrative proceedings.

18 ***Due Process and Administrative Discovery Are Not Mutually Exclusive***

19 As a final matter, Respondents object to what they describe as the Division preventing the
20 Respondents from having an opportunity “to be apprised of the claims against them.” Along these
21 lines, Respondents suggest that without authorization to pursue discovery in accordance with the
22 rules of civil procedure, Respondents will have been deprived of their due process rights.

23 This argument fails as a matter of law. As was cited in the Division’s prior challenges to
24 Respondents’ civil discovery requests, Arizona administrative discovery procedures (including, for
25 example, the exchange of witness and exhibit lists, the opportunity to depose witnesses, etc.)
26 readily comport with the demands of due process for administrative proceedings. *Cf. Cimarusti v.*

1 *Superior Court*, 79 Cal.App.4th 799, 94 Cal.Rptr.2d 336 (2000)(pre-hearing discovery and hearing
2 procedures as provided under the state's Administrative Procedures Act fully satisfied the
3 petitioner's due process rights; *Silverman v. Commodity Futures Trading Commission*, 549 F.2d 28
4 (7th Cir. 1997)(provision of witness lists, identification of investigators, and copies of memoranda
5 reflecting petitioner's own statements satisfied due process in administrative proceeding);
6 *Huntsville Mem. Hospital v. Ernst*, 763 S.W.2d 856, 859 (Tex.App. 1988)(due process in
7 administrative proceedings mandates notice, a hearing, and an impartial trier of facts, but not
8 various methods of discovery); *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting
9 *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)("the fundamental requirement of due process is the
10 opportunity to be heard at a meaningful time and in a meaningful manner"); *Swift & Co. v. U.S.*,
11 308 F.2d 849, 851 (7th Cir. 1962)("due process in an administrative proceeding, of course, includes
12 a fair trial, conducted in accordance with fundamental principles of fair play and applicable
13 procedural standards established by law"); *see also* 73A C.J.S. *Public Administrative Law and*
14 *Procedure*, § 60 (1983).

15 Perhaps rather than filing inappropriate civil discovery requests and then complaining about
16 no information, Respondents should consider following the various appropriate administrative
17 discovery procedures. In this manner, Respondents can obtain all the information necessary to
18 present a full defense to the Division's allegations.

19 **Conclusion**

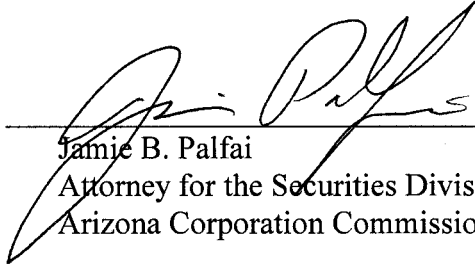
20 The discovery rules for contested administrative proceedings in this state are expressly
21 provided by statute and agency rule, and the principles of due process are amply preserved within
22 these rules. As a consequence, discovery requests predicated on inapplicable rules of civil
23 procedure are misplaced in this administrative forum. It follows that the Division is neither
24 inclined nor obligated to comply with Respondents' civil procedure-based discovery attempts.

25 Moreover, Respondents have provided no compelling authority or rationale under which
26 this administrative tribunal could justify deviating from these principles. Under the circumstances,

1 Respondents' Motion to Compel or Vacate should be denied in full, and the Respondents should
2 be instructed to cease in their attempts at using inappropriate discovery techniques in this
3 administrative forum.

4
5 RESPECTFULLY SUBMITTED this 5th day of April, 2004.

6
7 By


8 Jamie B. Palfai

9 Attorney for the Securities Division of the
10 Arizona Corporation Commission
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14
15
16

17 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
18 filed this 5th day of April, 2004, with

19 Docket Control
20 Arizona Corporation Commission
21 1200 West Washington
22 Phoenix, AZ 85007

23 COPY of the foregoing hand-delivered this
24 5th day of April, 2004, to:

25 Mr. Marc Stern
26 Hearing Officer
Arizona Corporation Commission/Hearing Division
1200 West Washington
Phoenix, AZ 85007

1 COPY of the foregoing mailed
2 this 5th day of April, 2004, to:

3 Martin R. Galbut, Esq.
4 Jeana R. Webster, Esq.
5 GALBUT & HUNTER, P.C.
6 Camelback Esplanade, Suite 1020
7 2425 East Camelback Road
8 Phoenix, Arizona 85016
9 Attorneys for Respondents Yucatan Resorts, Inc.,
10 Yucatan Resorts S.A., RHI, Inc., and RHI, S.A.

11 Paul J. Roshka, Jr., Esq.
12 James McGuire, Esq.
13 ROSHKA HEYMAN & DEWULF, P.L.C.
14 400 East Van Buren Street, Suite 800
15 Phoenix, Arizona 85004
16 Attorneys for Respondents Michael and Lory Kelly

17 Joel Held, Esq.
18 Elizabeth Yingling, Esq.
19 Jeffrey D. Gardner, Esq.
20 BAKER & MCKENZIE
21 2300 Trammell Crow Center
22 2001 Ross Avenue, Suite 2300
23 Dallas, Texas 75201
24 Attorneys for Respondents Yucatan Resorts, Inc.,
25 Yucatan Resorts S.A., RHI, Inc., and RHI, S.A.

26 Tom Galbraith, Esq.
Kirsten Copeland, Esq.
3003 North Central Avenue, Suite 1200
Phoenix, Arizona 85012-2915
Attorneys for Respondent World
Phantasy Tours, Inc.

By: 